Case Nos. 18-2256 and 18-2520

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

St. Paul Park Refining Co., LLC d/b/a Western Refining

Petitioner/Cross-Respondent,

v.

National Labor Relations Board,

Respondent/Cross-Petitioner.

On Appeal from the National Labor Relations Board
Case Nos. 18-CA-187896 and 18-CA-192436

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT ST. PAUL PARK REFINING CO., LLC D/B/A WESTERN REFINING

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INTRODUCTION

The hearing record and initial briefing in this matter leave it undisputed that on November 4, 2016, two series of events took place at the refinery operated by Petitioner/Cross-Respondent St. Paul Park Refining Co. ("SPPRC or Company"). First, in the morning, charging party Rick Topor and his colleague Michael Rennert raised safety concerns that were considered and thoroughly addressed by SPPRC's management team. Second, in the afternoon, Topor, acting alone, repeatedly refused to discuss ways to increase the safety of a procedure he alleged was unsafe, and as a consequence was sent home.

After Topor was sent home, it is undisputed that SPPRC promptly and thoroughly investigated the day's events. The investigation concluded that Topor refused to engage in mitigation discussions with his supervisors, pointed and shouted in a supervisor's face, refused a direct order from the same supervisor to return a company document, removed the document from Company premises in violation of policy, and was not candid during the investigation. SPPRC accordingly issued Topor a ten-day suspension and final written warning. The discipline issued to Topor was unrelated to any protected concerted activity, and nobody else involved in the day's events was disciplined.

Rather than confront the reality of the facts and law, the Brief of Respondent/Cross-Petitioner National Labor Relations Board ("Respondent's

Brief" or "Board") simply repeats the same faulty analysis and approach found in the Decision and Order that is now under review. The Board's parroting of the factual recitation, case law, and argument contained in the Decision and Order, however, is unpersuasive and fails to meet the governing "substantial evidence" standard. SPPRC respectfully requests that this Court reverse the Board's Decision and Order because it is not properly supported by the evidence or the law.

LEGAL ARGUMENT

I. THE BOARD CONCEDES CRITICAL AND OUTCOME-DETERMINATIVE PORTIONS OF SPPRC'S CASE

Respondent's Brief either concedes or fails to credibly dispute the critical elements of SPPRC's case. In particular, SPPRC's presentation of the timing and substance of the day's events, as well as the contents and outcome of the investigation, remain substantially unchallenged. Based on the undisputed facts alone, SPPRC properly prevails under the *Wright Line* analysis, and the Court should reverse the Board's Decision and Order.

A. The Timing and Events of November 4 are Largely Undisputed

Respondent's Brief fails to address or outright concedes the accuracy of SPPRC's description of the evidence regarding the timing and substance of events that occurred at the refinery on November 4, 2016. Specifically, the following central facts remain unchallenged:

1. Background Facts

- SPPRC maintains policies which: 1) require all employees to assist in the correction of unsafe conditions as promptly as possible; 2) require discussion of appropriate mitigation measures; and 3) emphasize the safety philosophy: "[w]hen in doubt, we talk it out." (JA 214, 405, 548, 553; RBr. 5-7).[1]
- SPPRC also maintains policies that prohibit: 1) the unauthorized possession or removal of Company property regardless of value; 2) insubordination; and 3) dishonesty. (JA 635-636). SPPRC has the authority to discipline employees for violation of these policies. (JA 333-377, 379-444, 635-636).
- As a Vacancy Relief Operator, Topor was a senior member of his crew who was expected to train other operators, troubleshoot, and set a good example. (JA 5, 379-444, 582-588, 616-618; RBr. 4-5).

2. Morning of November 4

- The Penex unit restart was well underway when Topor came to work on November 4, 2016.[2] (JA 125-126, 199-200, 226; RBr. 8).

[1] "JA references are to the parties' Joint Appendix. "RBr." references are to the Respondent's Brief.

[2] Unless otherwise specified, all events discussed below occurred on November 4, 2016.

- Reformer Day Foreman Corey Freymiller directed Field Operator Michael Rennert to introduce the contents of partially used HCL cylinders into the Penex at approximately 7:30 a.m., and expected the task to be completed by 9:00 a.m. (JA 44, 47, 611; RBr. 8).
- Rennert asked Shift Supervisor Dale Caswell for a written procedure related to the Penex injection. (JA 44, 47; RBr. 9).
- Caswell, Freymiller, and Unit Process Engineer Eric Rowe discussed the injection process with Rennert in great detail and Rennert said he was confident he could complete the task. (JA 44, 200-201, 228-229, 611; RBr. 9).
- Between 9:30 a.m. and 10:30 a.m. Topor inserted himself into the HCL injection process, halted its progress, and effectively called a safety stop. (JA 201-202, 204, 599 613-614; RBr. 9).
- SPPRC's safety stop procedures do not require the use of any "magic" language. Simply raising a safety concern is sufficient to initiate the process. (JA 547-553).
- Rowe returned to the Penex at 10:30 a.m. and the injection had not begun. Rennert and Topor raised safety and process concerns with Rowe, who then spent up to an hour answering their questions, reviewing documents, and taking notes. (JA 201-202, 204, 599 613-614; RBr. 9-10).

- Rowe conducted additional individual research and drafted a formal step-change procedure to address Rennert and Topor's concerns. (JA 203, 595-596; RBr. 10).[3]
- Rowe, Freymiller, and Operations Superintendent Briana Jung met to review and revise the document and Jung drafted, among other revisions, a new step 2(a) before all three signed off. (JA 100-101, 129-130, 203-204, 544-545; RBr. 10).

3. Afternoon of November 4

- Jung provided the step-change to Shift Supervisor Gary Regenscheid. Regenscheid reviewed the document before he and Jung presented it to Topor at approximately 3:00 p.m. The safety stop Topor had called in the morning was still in effect. (JA 9, 93, 131; RBr. 10).
- When presented with the step-change, Topor raised concerns related to step 2(a). As the drafter of step 2(a), Jung tried to explain it to Topor, but he would not engage in a dialogue. (JA 110-111, 130-131, 217; RBr. 10).
- Regenscheid went into the field to inspect the Penex setup. When he returned, he suggested Topor's concern with step 2(a) could be effectively mitigated by using an insulation blanket. Again, Topor refused to engage in a dialogue. (JA 132, 217-218, 583-589; RBr. 11).

[3] A "step-change" is a revision to part of an existing written procedure.

- Topor ignored Regenscheid's mitigation proposal and, without the benefit of any dialogue, announced he was calling a "safety stop." Topor also demanded that the Safety Department be called. (JA 132, 583-588, 590-592; RBr. 11).
- The safety stop related to the Penex had already been in effect since approximately 9:30-10:30 a.m. and the Safety Department, which does not handle engineering questions, was not the appropriate team to address Topor's concern. (JA 91, 127, 132, 138, 149, 223, 242).
- Regenscheid again attempted to discuss mitigation with Topor, but Topor flatly refused.[4] (JA 132-133, 146, 218, 583-588, 590); RBr. 11).
- Jung and Regenscheid went into the field to review the Penex setup one more time. After their review, they each called Topor on the radio asking him to come into the field to inspect the Penex. Topor did not respond. After multiple calls and some delay, Topor acquiesced. (JA 133-134, 583-588, 590-592; RBr. 11).
- Jung attempted to have a conversation with Topor regarding mitigation of his concern but Topor refused, repeated that he was calling a "safety stop,"

[4] The parties dispute whether at this point Topor pointed in Regenscheid's face and yelled at him. Although the credible evidence overwhelmingly establishes that Topor acted in such a manner, that determination is not critical to this aspect of the present analysis.

and insisted that the Safety Department needed to come down. (JA 133-134, 583-588, 590-592; RBr. 11-12).

- Regenscheid then directly asked Topor whether he would discuss mitigation and Topor said he would not, instead again repeating that he was calling a "safety stop." (JA 548-553, 583-588, 590-592; RBr. 12).
- Regenscheid told Topor that he needed to go home for the day, and directed Topor to return the step-change document. Topor did not return the step-change document and instead took it home with him.[5] (JA 23, 134-135, 219, 583-588, 635-636; RBr. 12).
- Only Topor was sent home or otherwise disciplined as a result of the events of November 4. (JA 24, 28; RBr. 13).
- The HCL injection process was later completed, safely and without incident, by another bargaining unit employee. (JA 205, 206; BRr. 13).

B. The Contents and Outcome of the Investigation Are Substantially Undisputed

Respondent's Brief also concedes or fails to dispute several critical facts regarding SPPRC's investigation. Namely, it is not disputed that:

[5] The parties also dispute whether Topor heard Regenscheid's direction and whether he directly refused. Once again, although the credible evidence overwhelmingly establishes that Topor did hear and did refuse, that determination is not critical to this aspect of the present analysis.

- SPPRC's HR Department, through Human Resources Director Tim Kerntz and Human Resources Generalist Christa Powers, conducted a timely investigation following the events of November 4. (JA 247; RBr. 13-14-16).
- Kerntz and Powers reviewed written statements from five employees directly involved—Jung, Regenscheid, Caswell, Rowe, and Freymiller. (JA 590-592, 601-604, 606, 608-611, 613-614; RBr. 14).
- Kerntz and Powers also interviewed six directly involved employees—Jung, Regenscheid, Caswell, Rowe, Olson, and Topor. (JA 247, 583-588; RBr. 14).
- SPPRC's investigation found that Topor refused to participate in mitigation discussions with his supervisors and removed the step-change document from the premises, both in violation of Company policy.[6] Topor was then suspended for ten (10) days and given a final warning. (JA 564, 583-588; RBr. 16).

[6] The parties dispute the validity of the investigation's finding that Topor was insubordinate when he pointed and shouted in a supervisor's face and that he violated Company policy by refusing a supervisor's direct order to return the step-change document. As discussed more fully below, the credible evidence overwhelmingly establishes that the investigation's findings in this regard are accurate. For purposes of this aspect of the present analysis, however, resolving the issue is not critical.

C. SPPRC Prevails Under *Wright Line* Based on the Undisputed Facts

Based solely on the clear weight of the foregoing facts, and leaving aside the few remaining areas of disagreement, the Board cannot meet its substantial evidence burden and fails to satisfy at least two required elements under the *Wright Line* analysis. First, Topor was not engaged in protected concerted activity during the interactions that took place in the afternoon of November 4. Rather, it is undisputed that during that afternoon, Topor acted alone and in his own personal interest when he refused to participate in a dialogue with his supervisors Jung and Regenscheid. In fact, he refused several attempts to discuss his purported concerns about the interpretation of step 2(a) of the new step-change document with his supervisors, repeatedly stating only that he was "calling as safety stop" and demanding that the Safety Department come down, despite the obviously duplicative and misguided nature of both requests. Topor's refusal to discuss mitigation measures and to "talk it out" with his supervisors was insubordination, not protected concerted activity; it was a clear and direct violation of Company policy. Without a showing of protected concerted activity, the Board fails under *Wright Line*. On this ground alone, the Board's Decision and Order finding a violation of Section 8(a)(1) must be overturned.

Second, the undisputed facts also demonstrate an additional flaw in the Board's *Wright Line* analysis—the record establishes that SPPRC would have

taken the same disciplinary action regardless of whether Topor's behavior is regarded as protected activity. Specifically, it is undeniable that SPPRC's investigation explicitly and accurately found that Topor refused to engage in mitigation talks as directed and that he took the step-change document home with him. Both of these acts are in direct contravention of multiple company policies, and the record is clear that SPPRC would have taken the same disciplinary measures regardless of any protected activity. (*See e.g.* JA 138, 140, 149, 220, 242). Therefore, based on the undisputed aspects of the record alone, the Board failed to meet the *Wright Line* standard, and the Decision and Order must be overturned.

II. THE BOARD HAS NOT PROVIDED SUBSTANTIAL EVIDENCE OF A SECTION 8(A)(1) VIOLATION

Focusing solely on those facts that are substantially undisputed makes clear that the Board has failed to establish facts sufficient to establish a violation of Section 8(a)(1). An examination of the Board's reasoning as set forth in Respondent's Brief and the underlying Decision and Order makes clear that its legal analysis similarly fails to pass muster under the well-established applicable legal standards.

A. Topor's Refusal to Discuss Mitigation Was Not Protected Concerted Activity—The Board Wrongly Blurs the Line Between Topor's Two-Part Day

The events that occurred at the refinery on November 4 must be divided into two separate and distinct parts. First, the events of the morning ending with SPPRC's preparation of the step change document: Topor and Rennert raised safety concerns with the Penex restart procedure resulting in a safety stop between 9:30 a.m. and 10:30 a.m. In response, the procedure was halted and at least five additional employees—Caswell, Freymiller, Rowe, Jung, and Regenscheid—worked diligently over the next five hours to address the concerns raised. Ultimately, a step-change procedure was drafted and readied for implementation, all while the safety stop continued in effect. Second, the events beginning in the early afternoon: Jung and Regenscheid attempted to present the step change to and engage in a dialogue with Topor, who flatly refused to engage with them. Topor refused to discuss, in particular, step 2(a) with Jung who had drafted it only hours earlier; he pointed and shouted at Regenscheid; repeatedly announced he was calling a "safety stop" (which had already been ongoing for many hours at that point); continually refused to discuss any method of mitigating what he claimed was a safety risk; ignored a directive from Regenscheid to return the step-change procedure; and took the procedure home with him against Company policy.

To the extent Rennert and Topor's morning actions are alleged to constitute protected concerted activity, it is clear that Topor's much later unilateral refusal to discuss mitigation and his ensuing acts of insubordination in the afternoon plainly were not. Respondent's Brief and the Board's Order, however, refuse to acknowledge any demarcation between the two distinct courses of events. Without explanation or evidence, the Board leaps to the conclusion that Topor's refusal to discuss mitigation was the "logical outgrowth" and "inextricably linked" to the safety concerns he and Rennert had raised in the morning.

The Board's analysis on this point is unsound and is not based on existing law. If left unchecked, the Board's expanded view of protected concerted activity permits an employee to raise a safety concern—justifiably or otherwise—and then be completely relieved from both work duties and accountability for obeying established workplace policies from that point forward. Under the Board's apparent view, an employee who calls for a work stoppage based on an alleged safety concern can refuse even to discuss ways to resolve that concern without repercussion. In the context of a workplace like an oil refinery—with ever-present potential hazards—a single employee, acting alone, could effectively shut down operations indefinitely and without explanation. The Board's Order must be overturned to prevent such an economically chilling and improper expansion of the concept of protected concerted activity. *See Gubagoo, Inc. & Daniel Bartolo,* __

NLRB__, 28-CA-203713, 2018 WL 2834419 (June 8, 2018) (Two unrelated events must be considered separately to avoid "giv[ing] employees license to engage in protected activity and then immediately engage in poor performance or misconduct under a cloak of protection.").

B. SPPRC Harbored No Animus Toward Topor's Safety Concerns

Topor was disciplined for his unacceptable behavior, not because of any alleged protected concerted activity. The Board's Order, and now Respondent's Brief, mistakenly argue that SPPRC harbored illegal animus toward Topor because (1) Jung and Regenscheid sent Topor home on November 4, (2) SPPRC's investigation was supposedly "inadequate" and (3) SPPRC's claims that Topor was disciplined for pointing and shouting in his supervisor's face and for failing to return the step change document were pretextual. A closer analysis makes clear that the Board is mistaken in each argument.

1. Sending Topor Home is Not Evidence of Animus

Topor was sent home on the afternoon of November 4, because he refused to discuss mitigation options and he behaved insubordinately. SPPRC's decision did not reflect animus toward any alleged protected concerted activity. The timing of events alone demonstrates it was Topor's inappropriate behavior in the afternoon, not safety concerns expressed earlier in the day, that led management to send him home. This point is highlighted by the fact that Rennert, who also raised safety

concerns related to the Penex procedure in the morning and throughout the day, was not disciplined in any way. Only Topor was sent home after he unreasonably refused to participate in mitigation discussions required by the STOP Process, something Topor claimed to be following, and pointed his finger and yelled in Regenscheid's face.

Respondent's Brief incorrectly states that Topor was sent home "explicitly because he called a safety stop and refused to discuss mitigation." In truth, Topor *was* sent home because he refused to discuss mitigation, but *not* because he called a safety stop. A safety stop had been in effect for over five hours by the time Topor was sent home and the fact that he *claimed* to be calling a safety stop later that afternoon does not change that. It defies logic that SPPRC would spend all day addressing the safety concerns raised by Rennert and Topor, just to send Topor (and *only* Topor) home for having raised those concerns, five hours later.

The Board also wrongly equates SPPRC's dissatisfaction with Topor's refusal to discuss mitigation with a refusal to "perform the steam-heat acid-injection process with insulation blankets despite his reservation." This is a false equivalency. Nothing in the record remotely suggests that Topor was directed, forced, ordered, or pressured to perform the task (with or without the insulation blankets). (*See* JA 110). He was merely asked to *consider* and *discuss* the possibility of using insulation blankets to mitigate the risk he perceived but he

refused to do so. He refused to discuss it with Jung who drafted step 2(a), he refused to discuss it or review the possible set-up with Regenscheid, and he pointed and shouted in Regenscheid's face. That is why Topor was sent home.

2. SPPRC Conducted a Thorough and Fair Investigation That Is Not Evidence of Animus

Governing precedent establishes that SPPRC's investigation is not evidence of animus. *See e.g. International Baking Corp.*, 348 NLRB 1133, 1154-1155 (2006) (no animus where no evidence employer sought to distort inquiry or engage in sham fact gathering); *Bonanza Aluminum Corp.*, 300 NLRB 584, 590 (1990) (employer need not interview "all possible witnesses to an incident"); *Wal-Mart Stores, Inc. & United Food & Commercial Workers Int'l Union*, 349 NLRB 1095, 1104 (2007) (investigation "adequate" where employer did not even interview subject of investigation); *Amcase Automotive of Indiana*, 348 NLRB 836, 839 (2006) (Board cannot infer animus from employer's failure to investigate in some preferred manner).

SPPRC investigated the report of Topor's misconduct, first received from Jung, by taking written statements from five people (Jung, Regenscheid, Caswell, Rowe, and Freymiller) and interviewing six (Jung, Regenscheid, Caswell, Rowe, Olson, and Topor). Based upon the breadth and reliability of that information, SPPRC rightly concluded that Topor had engaged in multiple insubordinate acts and policy violations, including refusing to participate in mitigation discussions,

pointing his finger and shouting in his supervisor's face, and refusing to return—and taking home—the step-change document. SPPRC also determined that Topor was not truthful during the investigation process.

The Board, in both its Order and brief, criticizes SPPRC's decision not to interview *even more* employees, but Kerntz, SPPRC's HR Director, appropriately selected the interviewees by reviewing the evidence he received. Neither Jung's written statement nor any other source identified additional individuals as involved in the actual events and discussions, and mere presence in the general vicinity of a discussion does not mandate that the bystanders be interviewed as part of an investigation. *Bonanza Aluminum Corp.*, 300 NLRB at 590. Similarly, the record contains no indication that either Regenscheid or *Topor himself* informed Kerntz that they believed any bystanders—upon whose testimony the Board now attempts to rely—were involved or could serve as knowledgeable witnesses.

Nevertheless, the Board asserts that SPPRC's failure to interview additional employees rendered the investigation "inadequate" and "patently and unapologetically one-sided." The Board also wrongly infers bias because Kerntz did not interview additional bargaining unit members regarding interactions in which they did not take part. Kerntz, however, had no reason or obligation to interview some unknown quota of bargaining unit members—particularly those that were not directly involved in the relevant discussions—and the Board's

assessment of the adequacy of SPPRC's actions based on its after-the-fact opinion of "truth" is not proper. The explanation for Kerntz's decision not to interview additional witnesses is clear and reasonable. He spoke to all three individuals actually present and involved in the critical events and discussions. Two (Jung and Regenscheid) provided consistent accounts of what occurred. Kerntz had no reason to believe that uninvolved bystanders could provide accounts of conversations, to which they were not party, that would alter his conclusions.

Finally, the reliance in the Board's brief on *Woodlands Health Ctr.,* 325 NLRB 351 (1998) and *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993) is misplaced. First, in *Woodlands Health*, the employer failed to interview two nursing home residents that were at the center of an abuse investigation, *i.e.* the residents who were actually abused. 325 NLRB at 364. Second, in *Sheraton Hotel*, the employer conducted NO investigation. 312 NLRB at 321-323. Rather, the employer spoke only with a supervisor and did not talk with either the claimant employee or any other employee who directly witnessed what occurred. *Id.* These cases are not analogous to the present matter. Here, SPPRC interviewed all of the witnesses who were directly involved, including Topor himself.

3. SPPRC's Beliefs and Findings About Topor's Conduct Were Not Pretextual

Topor was insubordinate on the afternoon of November 4, not only when he refused to discuss mitigation, but also when he shouted and pointed in

Regenscheid's face, ignored instructions to return the step-change document, and took the document home with him. These are facts SPPRC found to be true after completing its investigation and part of the reason for the measure of the discipline issued. They are not evidence of pretext.

The Board, however, in both its Order and Respondent's Brief argues that those events simply did not occur and, instead of properly assessing whether the decision-maker reasonably believed that they did, by bootstrap deems SPPRC's reliance on them as evidence of pretext and animus. As outlined in great detail in the SPPRC's opening brief at pages 36-51, however, the Board arrived at this mistaken conclusion only by inexplicably ignoring the clear, consistent, and accurate testimony of Jung and Regenscheid in favor of the self-serving and evasive testimony of Topor. The Board also gave undue credit to the confused testimony of two additional witnesses, Johnson and Morales, even though they admittedly were not directly involved in the relevant matter, were not active participants in the discussions between Topor, Jung, and Regenscheid, and did not pay attention or were otherwise not present for the entirety of those discussions.

The Board's position, including its credibility determinations, is not supported by substantial evidence. Viewed objectively, the evidence supports a finding that Topor yelled and pointed in Regenscheid's face, ignored instructions to return the step-change document, and took the document home with him.

SPPRC legitimately found that Topor did so and that formed part of the basis for sending him home and ultimately imposing a disciplinary suspension. No direct evidence in the record suggests SPPRC's explanation was pretextual or that it acted with illegal animus.

Respondent's Brief improperly relies on its contention that the SPPRC acted in a "post-hoc" fashion and is "shifting" its stated reasons for its actions, thus making them pretextual. Specifically, at multiple points the Board points out that Regenscheid's email—sent immediately after the events of November 4, 2016—begins by stating: "This pertains to issues with Rick Topor refusing to do assigned work." (*See* JA 603). According to the Board, this explicitly demonstrates unlawful motive and also shows "shifting explanations" because this same language is not used in SPPRC's later documentation explaining Topor's actions and discipline.

The problem with this analysis is multifaceted. First, examining the entirety of that very same email clarifies Regenscheid's intention: "I also feel Rick [Topor] was being insubordinate to me by refusing to *do the work to correct the issue*." (JA 603). In other words, the assigned work Regenscheid refers to is specifically the work involved in mitigating his safety concern—not, as the Board speculates, a specific directive to perform the work of completing the acid injection. SPPRC has always and consistently stated that failure to discuss mitigation was at the core

of the reason for Topor's discipline. There is no "shifting explanation." Second, as further evidence of SPPRC's consistent position, Jung's email from that afternoon also states plainly: "Rick was unwilling to discuss with [Regenscheid] and I the mitigation and work through the potential options to inject the HCL in the system, which is viewed as insubordination and is why I chose to send him home." (JA 602). Finally, Topor has never credibly claimed that he was directed to perform the mitigated procedure that Jung and Regenshceid were simply trying to discuss with him. (JA 110).

The Board also now claims that SPPRC cannot meet its burden regarding the ALJ's mistaken credibility determinations by supposedly "cherry-picking and reproducing long testimonial quotes…." It is not "cherry-picking," however, to demonstrate that *six pages* of broad conclusory determinations made by the ALJ, and adopted by the Board, are unsupported by the record. And, tellingly, the Board does not even try respond to the substance of the illustrative transcript sections cited by SPPRC. The reason for that is obvious—on its face, the transcript plainly demonstrates that the Board's asserted reasons for concluding that the testimony of witnesses was not credible are themselves incredible. The Court should not give credence to such "credibility determinations" which are little more than attempts to protect a pre-determined outcome disguised as credibility assessments. *See e.g. Salant & Salant, Inc.,* 92 NLRB 343, 358-360 (1950);

Herbert F. Darling, Inc., 267 NLRB 476, 477 (1983); *Russell Stover Candies, Inc.*, 221 NLRB 441, 443 (1975).

C. SPPRC Would Have Disciplined Topor in the Same Manner Even Absent Any Alleged Protected Activity

The Board's failure to establish a *prima facie* case relieves SPPRC of any duty to demonstrate it would have disciplined Topor absent protected activity. The evidence, however, establishes that SPPRC would have taken the same action notwithstanding the alleged protected conduct. *See NLRB v. La-Z-Boy Midwest, a Div. of La-Z-Boy Inc*., 390 F.3d 1054, 1057 (8th Cir. 2004).

SPPRC completed a thorough and fair investigation. Based upon that investigation, the SPPRC reasonably[7] concluded that Topor refused to discuss mitigation, was insubordinate, violated company rules, and was not candid during the investigation. SPPRC issued Topor a final written warning and ten day suspension based on this reasonable belief. The hearing testimony established that Topor was disciplined not for what he alleges was protected activity—i.e., calling a

[7] "In order for an employer to meet its *Wright Line* burden, it does not need to prove that the employee actually committed the alleged offense, but must only show that it had a reasonable belief that the employee committed the offense, and that the employer acted on that belief in taking the adverse employment action against the employee." *Midnight Rose Hotel & Casino, Inc*., 343 NLRB 1003, 1005 (2004); *see also Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 434 (D.C. Cir. 2012) ("An employer who holds a good-faith belief that an employee engaged in the misconduct in question has met its burden under *Wright Line*. This is true even if the employer is ultimately mistaken about whether the employee engaged in the misconduct. The good-faith belief demonstrates that the employer would have acted the same even absent the unlawful motive.") (citation omitted).

safety stop—but based on SPPRC's reasonable belief that, hours after the safety stop began, he engaged in insubordinate behavior and violated Company rules. Topor would have faced the same disciplinary action for this conduct regardless of whether by "calling a safety stop" he engaged in protected activity because it was not "calling a safety stop" that led SPPRC to send him home and subsequently discipline him. The fact that he *said* he was calling a safety stop that afternoon while refusing to have a reasonable conversation with his supervisors does not magically render his actions protected, and that is even more so given that the safety stop from the morning was *still in effect*, as Topor knew.

After investigation, SPPRC reasonably believed Topor engaged in multiple acts which, standing alone, supported discipline up to and including discharge. Every SPPRC official involved in the discipline testified Topor's behavior violated numerous policies and the *same disciplinary action—or something more severe—* ***would*** *have issued regardless of Topor's alleged protected concerted activity*. Such testimony rebuts any inference of discrimination.

The Board, in both its Order and brief, argues that SPPRC would not have disciplined Topor but for what it regarded as "protected concerted activity." In doing so, the Board tries to draw an adverse inference from the absence of evidence regarding other employees who engaged in similar misconduct and their associated discipline, without showing that any such similar employee misconduct

had ever occured. The Board, in effect, wants to require SPPRC to prove a negative. But, it is not SPPRC's burden to produce such evidence and the Board is not empowered to draw such an adverse inference. Moreover, no evidence in the record indicates that any other SPPRC employee has ever engaged in behavior similar to Topor. [8] The Board's criticism for not presenting evidence regarding how such phantom employees were treated is illogical. *See Midwest Terminals of Toledo Int'l, Inc. & Int'l Longshoremens Ass'n, Local 1982, AFL-CIO & Don Russell*, 365 NLRB No. 138 (2017).

III. THE RECORD DOES NOT SUPPORT THE BOARD'S REMAINING ARGUMENTS REGARDING REOPENING THE RECORD AND WAIVER

A. The Board Abused Its Discretion By Denying SPPRC's Motion to Reopen the Record to Include the Arbitration Award

The Board had the authority to, and should have, reopened the record to include the arbitration award. Failure to do so was an abuse of discretion that should be reversed, particularly given the inclusion in the record of a letter from Minnesota OSHA that resulted from a preliminary investigation that lacked observance of basic due process rights.

Respondent's Brief in opposition to the reopening of the record relies primarily on two unavailing arguments that are not supported by the record. First,

[8] In fact, the evidence shows that Rennert, the employee who also participated in the morning safety stop, but was not later insubordinate, was not disciplined.

the Board argues that the award could not be admitted because it was not "newly discovered" pursuant to 29 C.F.R. § 102.48(c)(1). But as thoroughly argued in SPPRC's opening brief, the plain language of that Section allows the record to be reopened in any of three separate scenarios—where there is "[1] newly discovered evidence, [2] evidence which has become available only since the close of the hearing, or [3] evidence which the Board believes may have been taken at the hearing will be taken at any further hearing." *Id.* Here, the arbitration award fits squarely within the second category because it only became available after the record before the Board was closed. To find any other way would be an obvious misapplication of the plain language of the Section and contrary to longstanding cannons of interpretation. *See Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522, 528 (8th Cir. 1995) (the court does not defer to an agency's interpretation of its own regulation when an alternative reading is compelled by the regulation's plain language).

Second, the Board argues that admitting the arbitration award would not meet the requirement of 29 C.F.R. § 102.48(c)(1) that "if adduced and credited, [the award] would require a different result." But as outlined in SPPRC's opening brief, the arbitration award found—based on evidence substantially identical to that received in this matter—that SPPRC had just cause to discipline Topor based on his insubordinate refusal to engage in mitigation conversations with his

supervisors, that SPPRC appropriately issued a final written warning and suspension, and that Topor was not a credible witness on his own behalf. Crediting the arbitration award, particularly as to Topor's lack of credibility, would plainly require a different result in this matter and the Board's failure to admit it was an abuse of discretion that should be reversed.

B. The ALJ and Board Abused Their Discretion by Denying SPPRC's Motion to Reopen the Record To Include the MNOSHA Safety Letter

The ALJ and the Board also had the authority to, and should have, reopened the record to include the MNOSHA safety letter. Failure to do so was an abuse of discretion that should be reversed.

Contrary to the argument in Respondent's Brief, this issue is properly before the Court. Indeed, as the Board must concede, SPPRC formally made exceptions to the ALJ's denial of its motion to reopen and has now thoroughly addressed the issue in its opening brief. (JA 701); *see also Camelot Terrace, Inc. v. NLRB.,* 824 F.3d 1085, 1090 (D.C. Cir. 2016) (citing *Parsippany Hotel Mgmt. Co. v. NLRB,* 99 F.3d 413, 417 (D.C. Cir. 1996) (ground for preserving exception need not be explicit, must only be evident by the context in which it is raised). Moreover, the ALJ and the Board were both positioned to receive the MNOSHA safety letter under the Board's Rules and Regulations, and should have, because of the significant disagreement between the parties regarding the safety of the Penex

procedure, the ALJ's stated belief that safety was a critical question ("this whole case is about whether there was a safety issue…" (JA 106)), and because of the ALJ's previous decision to accept a *preliminary* MNOSHA letter into the record. (JA 105-106). The failure to admit the MNOSHA correspondence, which made clear that the incident in question did not involve an actual issue of employee safety, was an abuse of discretion that should be reversed.

C. The Board is Not Entitled to Summary Enforcement of the Portion of its Decision and Order Purportedly Remedying the SPPRC's Alleged Threats to Rennert

The Board contends that, as a result of waiver, it is entitled to summary enforcement of the portion of its Decision and Order that it improperly describes as remedying threats allegedly made by Regenscheid to Rennert sometime in September or October of 2016. (RBr. 21-22; JA 728). Properly viewed in the context of this proceeding, however, that paragraph exists only as a proposed remedy for violations of *Topor's* rights, and it is beyond dispute that SPPRC has consistently challenged both the basis for a finding of liability and the remedies ordered by the Board, including paragraph 1(a) of the Decision and Order. The Board, therefore, is not entitled to summary enforcement.

As an initial matter, the Consolidated Complaint in this matter contains NO allegations relating to alleged threats made by Regenscheid to Rennert, and such

"threats" were not litigated at the hearing.[9] (*See* Consolidated Complaint). Indeed, the Consolidated Complaint does not raise any stand-alone unfair labor practice allegations concerning Rennert—*only* Topor—and neither the ALJ nor the Board is empowered to re-cast the proceeding or craft remedies for claims that were never made. *See* Consolidated Complaint; *see also NLRB v Blake Construction Co.,* 663 F.2d 272, 279 (D.C. Cir. 1981) ("The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated at the subsequent hearing.") On that fact alone, the Decision and Order on this point must be reversed—not summarily enforced.

Moreover, contrary to the Board's argument, SPPRC properly disputed the ALJ's finding of the alleged threats by filing an explicit formal exception. (*See* JA 698). *See also Camelot Terrace, Inc.,* 824 F.3d at 1090 (citation omitted).

[9] At the hearing, any evidence regarding alleged threats made to Rennert was introduced solely in a failed effort to persuade the Board that SPPRC had discriminated against *Topor* because of his role in union negotiations. The ALJ and the Board, however, ruled against the General Counsel on that 8(a)(3) claim: "[Regensheid's] statements would reasonably tend to interfere with employee's exercise of Section 7 rights and violate Section 8(a)(1). Nonetheless, the statements were not directed at Topor, but at Rennert, who was not involved in the union, and the statements involved conduct wholly unrelated to that which led to Topor's suspension. Accordingly, and in agreement with Respondent, I find this lone threat made to one employee is insufficient to sustain the General Counsel's animus burden." (JA 744). Viewed from the perspective of the ALJ's opinion, the remedial order contains terms inconsistent with his finding on the only issue properly before him: the alleged statements do not show a violation of Topor's rights.

Additionally, SPPRC has sufficiently disputed the matter in this venue. Indeed, SPPRC has petitioned for review of the entire Decision and Order and has consistently argued its position that no threats occurred and that the Order should be reversed.[10] Finally, it is noteworthy that the entire 8(a)(1) analysis section of the ALJ's Order (the analysis that supposedly found a violation and required a remedy) fails even to address any alleged threats made to Rennert. (*See* JA 738-744). This strongly calls into question the ALJ and Board's unsupported finding and remedy on this issue.

CONCLUSION

The Board erred by concluding that SPPRC violated Section 8(a)(1) by issuing Topor a final written warning and ten day suspension and by denying SPPRC's motions to reopen the record. The Board failed to properly review the order issued by the ALJ, and its decision is unsupported by substantial evidence and goes beyond what good sense permits. The Board's Decision and Order must be reversed and its cross-application for enforcement denied.

[10] This is particularly true considering that the only proper interpretation of the Board's Decision and Order requires regarding the paragraph in question as part of the remedy for the claim brought on behalf of Topor. When viewed in that light, it is clear that SPPRC has consistently objected to any and all relevant claims by challenging both the grounds for liability and by seeking reversal of the entire Decision and Order entered by the Board.

Dated: December 14, 2018

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,415 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE FOR DOCUMENTS FILED USING CM/ECF

I certify that on December 14, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

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